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No. 99-858

In the Supreme Court of the United States

CITY OF ANAHEIM, PETITIONER

v.

CALIFORNIA CREDIT UNION LEAGUE AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a local government may levy a hotel occupancy tax on employees of a federal credit union traveling on credit union business when the credit union reserves the rooms and pays the taxes directly.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A5, A6-A15) are reported at 95 F.3d 30 and 190 F.3d 997. The order of the district court (Pet. App. B1-B2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1999. The petition for a writ of certiorari was filed on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7280(a) of the California Revenue and Tax Code (West 1998) authorizes any city to levy "a tax on

the privilege of occupying a room or rooms * * * in a hotel, * * * motel, or other lodging unless the occupancy is for any period of more than 30 days." Acting pursuant to that authority, the City of Anaheim enacted an ordinance providing that, "[f]or the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of thirteen percent of the rent." Anaheim Mun. Code § 2.12.010.010 (1992). A "transient" is defined as "any person who exercises occupancy, or is entitled to occupancy, of any room, space, lot area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral." Anaheim Mun. Code § 2.12.005.100 (1992). "Each operator [is required] to collect the tax to the same extent and at the same time as the rent is collected from every transient." Anaheim Mun. Code § 2.12.020.010 (1992).

2. In November 1993, federal credit union employees stayed at a hotel in the City of Anaheim while on credit union business (Pet. App. A2). The hotel collected the occupancy tax from the credit union employees. The California Credit Union League, acting on behalf of its member federal credit unions, thereafter filed this action to obtain a declaratory judgment that the levying of petitioner's transient occupancy tax on employees staying at hotels on credit union business violated 12 U.S.C. 1768 (Pet. App. A7).[1] That statute specifies that, with exceptions not at issue in this case,

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[1] The League limited its request for declaratory relief to situations in which (i) the federal credit union pays the invoice directly or (ii) the employee traveling on credit union business pays with the credit union's corporate credit card. This case does not involve situations in which (i) a payment is made by an employee using his own funds or (ii) the credit union subsequently reimburses the employee for such a payment (Pet. App. F7).

federal credit unions "shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority." 12 U.S.C. 1768.

The district court granted summary judgment to the League (Pet. App. B1). The court reasoned that federal credit union employees "stand in the shoes of the government, and the incident [sic] of the tax should fall on the government as their employer, not them as employees" (*id.* at F4).

3. The court of appeals affirmed (Pet. App. A1-A5). The court noted that 12 U.S.C. 1768 confers a broad immunity from state and local taxation upon federal credit unions—an immunity that is "coterminous with that afforded by the supremacy clause" (Pet. App. A3). The court stated that this broad federal immunity from local taxation extends to employees of federal entities engaged in the performance of "their professional duties" (*id.* at A5, citing *United States* v. *New Mexico*, 455 U.S. 720 (1982)). The court concluded that, "[b]ecause the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim," they were immune from the local occupancy tax under 12 U.S.C. 1768 (Pet. App. A5).

The court of appeals explained that *United States* v. *County of Fresno*, 429 U.S. 452 (1977), on which petitioner mistakenly relies, supports the League's position in this case. In *County of Fresno*, this Court held that employees of the United States Forest Service could be taxed for the value of their possessory interest in houses that were supplied for their personal use by the United States. While the state tax upheld in *County of Fresno* thus properly reached only the personal benefit of the house to the Forest Service employees, the credit union employees involved in this case were improperly

subjected to an occupancy tax "solely because they were in the city on credit union business" (Pet. App. A5).

4. Petitioner filed a petition for a writ of certiorari (Pet. App. A7). While that petition was pending, this Court decided *Arkansas* v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), in which four production credit associations sought to enjoin the State of Arkansas from levying taxes against them. This Court addressed whether the Tax Injunction Act, 28 U.S.C. 1341, barred that suit.[2] While recognizing that the Tax Injunction Act "does not constrain the power of federal courts if the United States sues to protect itself or its instrumentalities from state taxation" (520 U.S. at 823), the Court concluded that instrumentalities chartered under federal law such as production credit associations "may not sue in federal court for an injunction against state taxation without the United States as co-plaintiff." *Id.* at 824. Following that decision, the Court granted the petition for a writ of certiorari in the present case, vacated the judgment of the court of appeals and remanded for further consideration in light of *Farm Credit Services* (Pet. App. A7, A8; 520 U.S. 1261).

5. On remand, the League and the United States filed a joint motion in the court of appeals to join the United States as a co-plaintiff. The court of appeals held that "the United States can join this lawsuit because it is requesting the same remedy as the League

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[2] 28 U.S.C. 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

and offers the same reasons for that remedy and because earlier joinder by the United States *would not* have affected the course of [the] litigation" (Pet. App. A9). The court further noted that, under *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), and *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1989), "the joinder of the United States as a plaintiff in this case has retroactively cured the jurisdictional defect identified by *Farm Credit Services*" (Pet. App. A13). The court of appeals then affirmed the decision of the district court on the merits, for the reasons stated in its prior opinion (*id.* at A15).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. "[I]t is well settled that, absent express congressional authorization, a State [or local Government] cannot tax the United States directly." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989). The federal immunity from state and local taxation has its roots in the Supremacy Clause of the Constitution (*South Carolina* v. *Baker*, 485 U.S. 505, 518 n.11 (1988)), and it applies not only to the United States but also to federal instrumentalities, such as the Red Cross (*Department of Employment* v. *United States*, 385 U.S. 355, 358, 360-361 (1966)), federal land banks (*Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 101-103 (1941)) and federal credit unions (*United States* v. *Michigan*, 851 F.2d 803, 805-807 (6th Cir. 1988)). Congress expressly conferred this broad immunity on federal credit unions by enacting 12 U.S.C. 1768, which specifies (with exceptions not involved in

this case) that such credit unions "shall be exempt from all taxation now or hereafter imposed by * * * any State, Territorial, or local taxing authority * * * ."[3] "[T]he immunity [thus] afforded by Section 1768 [is] coterminous with that afforded by the supremacy clause" (Pet. App. A3).

When, as here, a local Government imposes its hotel occupancy tax on agents of a federal instrumentality traveling through that locality on government business, that tax is barred both by the Supremacy Clause and by 12 U.S.C. 1768. As the court of appeals correctly held, "[b]ecause the federal credit unions' employees were attending to credit union business while staying * * * in Anaheim, they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under Section 1768." Pet. App. A5.

2. Petitioner contends (Pet. 7-11) that, in reaching this conclusion, the court of appeals improperly relied on two decisions of this Court. That contention is not correct.

a. In *United States* v. *County of Fresno*, 429 U.S. 452 (1977), the United States Forest Service provided housing to some of its employees as partial compensation for their services. The agency made a deduction from the cash wages of each such employee to reflect the estimated fair market value of this housing. *Id.* at 454. Two California counties imposed an annual *ad valorem* property tax on the possessory interest of these employees in the Forest Service cabins in which they resided. In upholding the constitutionality of this

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[3] Congress, however, has allowed state and local taxation of "any real property and any tangible personal property of such Federal credit unions * * * to the same extent as other similar property is taxed." 12 U.S.C. 1768.

local tax, this Court noted that "the occupancy of the Forest Service houses constitutes part of [the employees'] 'compensation' for services performed * * * [and] that the occupancy is of personal benefit to the employee." *Id.* at 466. The Court distinguished this sort of local taxation of the value of personal benefits (such as housing or wages) received by federal employees from impermissible attempts to subject federal functions or federal property to taxation: "[a]n attempt by California to impose a use tax on a Forest Service employee for his fire ax—which he used *only* in performing his job—or on a fire tower inhabited by such employee in the daytime and solely in order to perform his job would present a different question." *Id.* at 466 n.15. See also *Telegraph Co.* v. *Texas*, 105 U.S. 460, 462 (1882) (tax on telegraph messages sent by government officers on government business is unconstitutional); *United States* v. *County of Humboldt*, 628 F.2d 549, 552, 553 (9th Cir. 1980) (local tax unconstitutional if the legal incidence of the tax is on the federal government or if it interferes with a federal function or activity).

The distinction drawn by the Court in *County of Fresno* applies directly here. In this case, the employees of the federal instrumentality are not occupying hotel rooms for personal benefit. Instead, as petitioner concedes (Pet. 2), these employees are traveling on official federal credit union business. Unlike in *County of Fresno*, these facilities are not provided to employees as a form of compensation in lieu of their monetary wages. The hotel rooms are made available to these employees solely to provide them with a place to sleep while traveling on official business.[4] The employee does

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[4] Congress has, of course, long recognized that the costs of employee travel while away from home, including amounts expended

not experience a decline in his normal housing costs (such as rent or mortgage payments) or otherwise personally benefit from the travel. The court of appeals was thus correct in concluding (Pet. App. A5) that the decision in *County of Fresno* supports its holding in this case.

b. The court of appeals also correctly relied on the decision of this Court in *United States* v. *New Mexico*, 455 U.S. 720 (1982). In *New Mexico*, "[t]he Government concede[d] that the legal incidence of the gross receipts and use taxes f[ell] on the [Government] contractors." *Id.* at 738. The issue addressed in that case was "whether the contractors can realistically be considered entities independent of the United States." *Ibid.* In concluding that contractors are not to be treated as "'constituent parts' of the Federal Government," the Court emphasized that "the differences between an employee and one of these contractors are crucial." *Id.* at 740. The Court explained that "[t]he congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes." *Id.* at 740-741. Employees, by contrast, are "a special type of agent." *Id.* at 740.

In the present case, petitioner sought to impose taxes on employees engaged in the official business of the federal instrumentalities. The court of appeals correctly relied on the "crucial" distinction between contractors and employees recognized by this Court in *New Mexico*.

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for lodging, are ordinary and necessary business expenses of the employer. See 26 U.S.C. 162(a)(2).

3. Petitioner also errs in contending (Pet. 11-17) that the decision in this case conflicts with *United States* v. *Montgomery County*, 761 F.2d 998 (4th Cir. 1985). In that case, the court upheld an occupancy tax applied to hotel rooms rented by the National Institutes of Health for the temporary use of some of its outpatients. The court concluded that, even though NIH reserved and paid for the rooms, Montgomery County could apply its transient occupancy tax to the patients who used the rooms.

The rooms involved in the *Montgomery County* case were occupied by third parties who were not conducting business on behalf of NIH. In the present case, by contrast, the rooms were occupied by employees of the federal credit unions solely in connection with the performance of official business of those federal instrumentalities. As the court of appeals correctly stated in this case (Pet. App. A5, citing *United States* v. *New Mexico*, 455 U.S. at 740-741), when federal employees are acting on government business, they are properly treated as "'constituent parts' of the United States."[5]

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[5] For similar reasons, petitioner errs in contending (Pet. 20-22) that the decision in this case conflicts with the state court decisions in *Comptroller* v. *World Inns, Inc.*, 528 A.2d 477 (Md. 1987), and *Keystone Auto Leasing, Inc.* v. *Norberg*, 486 A.2d 613 (R.I. 1985). The *World Inns* case, like the present case, involved an occupancy tax. Unlike the present case, however, the employees in *World Inns* "contracted directly with [the hotel] for the rental of rooms and paid for the rooms with their personal funds." 528 A.2d at 481. The state court relied on these facts in concluding that the incidence of the tax fell on the employees and not the United States. *Ibid.* The court did not suggest that the tax would be permissible if, as in the present case, a federal entity reserved and paid for the rooms. The *Keystone Auto Leasing* case also addressed "situations in which federal employees lease automobiles and pay with cash or personal credit cards" (486 A.2d at 616) and it is therefore

Petitioner correctly notes (Pet. 12-13, 18) that the Fourth Circuit concluded in *Montgomery County* that the local occupancy tax involved in that case applied to the outpatients as "transients" and that "the United States Government * * * simply does not meet the definition of 'transient'" as defined in the local statute. 761 F.2d at 1001. That description of the local law at issue in *Montgomery County*, however, creates no conflict with the holding of the court of appeals in this case. Even when "the legal incidence of a tax falls on contractors or individuals" under local law, "the question remains whether those parties are independent entities" or are a constituent part of the United States (Pet. App. A4). "If they are not independent, the tax is invalid because it is a tax on the United States * * * ." *Ibid.* The difference between this case and *Montgomery County* does not turn on the legal incidence of the tax under local law; instead, it turns on the fact that in this case (unlike in *Montgomery County*) the persons using the hotel rooms were employees of a federal instrumentality engaged in the official business of that entity and not engaged in a personal use of the hotel rooms for personal benefit.[6]

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distinguishable from the present case for this same reason. The Comptroller General of the United States has long taken the position that "reimbursement" situations, such as those involved in *World Inns* and *Keystone*, are not appropriate occasions for the assertion of the federal government's tax immunity. 55 Comp. Gen. 1278 (1976).

[6] Petitioner incorrectly contends that the brief reference to a "visiting employee or guest" in the *Montgomery County* decision demonstrates that the "court dealt with the issue of 'employees'" in that case (Pet. 18). The only issue presented in *Montgomery County* was the constitutionality of the tax as applied to outpatients. There is no discussion in that case of the constitutionality

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of a local tax applied to rooms used by employees of the federal government engaged in official business, and the court did not purport to make any holding pertaining to such official uses.